

# Legal Blogs: The Search for Legitimacy

Lyle Denniston\*

A blog devoted to the law is not as informal as a juror's notes taken during an ongoing trial, nor is it as formal as a law journal article. It is not as detached as a courthouse journalist's stories should be (and sometimes are), and unlike a lawyer's brief, it will not always be as committed to one side in a legal controversy. Because it is in its early and formative years, the legal blogosphere is not exactly sure what it is; it is defined now by having no definition, each blog essentially self-identifies. And yet, this community of legal observers finds itself largely unable to claim legitimacy, either in a legal community that is seldom ready to embrace new authority when it comes in the form of popular expression, or in a journalistic community that seems forever suspicious of upstart rivals. In short, the exclusive clubs, so far, appear to be largely unwilling to admit this, presumptively shabby mannered, outsider.

To be sure, there are many voices in the blogosphere – including some speaking through legal blogs – insisting that bloggers have not the slightest interest in legitimacy, and claiming that they wouldn't accept it, even if it were conferred upon them gratuitously and wholly unearned. To be free, in the view of at least some in this chattering class, is to be unfettered by convention, unrestrained by civility, uninhibited by standards, and unconfined by ethics or law. The very nature of the medium – the absence of a tradition, the seemingly complete openness of the enterprise, the lack of enforceable credentialing, and the uncertainty of its status in law – contributes to such bravado, and lends some credence to the perception of the blogosphere as a playground of the immature, or worse, the irresponsible.

Still, one may assume that many legal blogs, would prefer to be treated as authoritative and reliable, widely visited

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\* Cum laude and Phi Beta Kappa graduate of the University of Nebraska, with a Master's degree with honors in American History and Political Science from Georgetown University. Lyle Denniston has been one of America's leading Supreme Court reporters for 45 years and currently blogs on SCOTUSblog.com.

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and quoted – kind of like little law journals or legal practices, done on the fly and yet done with care. If those who post on them are in fact, practicing attorneys, they presumably bring with them at least some of the restraints of professional ethics. If they are legal academics, they arguably are mildly constrained by peer pressure and by credibility factors. And if they are converted journalists (as is the author of this article), they live with poorly defined, but still limiting habits of objectivity and affection more for facts than for argument. But no matter the orientation that a legal blogger brings to the forum, the Internet's open entry, fluidity, and free-form character is at the heart of the problem of legitimacy and full acceptance.

There is a core question here: what must legal blogs now be, or become, in order to claim a genuine and perhaps lasting influence in the legal community? To be sure, legal blogs may want to appeal to the lay community, as organs of expression about the law for a public untutored in law, and for that to happen, they perhaps need not be or do anything other than keep their product marketable in a general sense, much like a newspaper or television news report on a legal event. It is most unlikely, though, that legal blogs could reasonably aspire to become mass media of a new sort. And it is very doubtful that a predominantly lay audience would be sufficient for most legal bloggers.

It is, then, the legal community whose attention legal blogs seek to attract and hold. Of course, a legal blog may remain only a "boutique" blog, at-

tracting but a few thousand hits on good days, but the natural appetite to be noticed by one's preferred audience leads to a desire for ever-widening acceptance. But the legal community is one accustomed to close regulation by codes of professional discipline and mechanisms for enforcing regularity; so how much are lawyers and judges likely to rely upon legal expression produced in a largely or entirely standardless environment? Would it be enough if lawyers and judges were merely amused or momentarily diverted by legal blogs? That hardly would be acceptance of a medium eager to be taken seriously.

Therein lies a core dilemma for legal blogs. If they are placed, voluntarily or involuntarily, under norms of "professional" conduct, ethics, law or credentialing, then they may cease to be what they have been, and perhaps what they ought to remain.

Perhaps the greatest threat to the originality of blogging, legal or otherwise, is the prospect of evolving into an imitator of the mainstream media ("MSM"). The rise and popularity of blogging is probably not due primarily to its immediacy (cable television and on-the-air radio has that, too), but rather may be due to the perception that the MSM have developed a common character, a sameness and predictability that stifles creativity, skepticism, and, overall, effectiveness. For example, how often do the top stories in the *New York Times* and *Washington Post* differ on any given day; can CNN avoid top billing for a story if Fox News is fronting it?

*Lyle Denniston*

The MSM, however, do have something that blogs do not have: the identity of “journalists,” and that carries with it ready access to observe the processes of governance, access that could be of signal importance in expanding the content of legal blogs. With the coming of the Internet, and the rise of online display of court documents, bloggers have extremely wide access to the judiciary, but not the opportunity for on-the-scene observation, unless they can garner a “public” seat in the proceedings. If “citizen journalists” functioning online are to gain journalistic access, they are going to have to begin conforming to someone else’s standards of “journalism.”

Consider that political bloggers, before they were granted press passes for the two presidential nominating conventions in 2004, were obliged to meet at least loose standards of entry laid down by credentialing officials. The reason that bloggers who focus on Congress are not now admitted to the Press Galleries there is that the credentialing committees – made up of “regular” journalists – have yet to devise entry standards for blog writers. And the U.S. Supreme Court and the lower federal judiciary follow the lead of Congress on this score.<sup>1</sup>

If legal bloggers are content to remain on the outside, of course, credentialing is not an issue. But that is not the only issue involved in functioning as something other than a “journalist.” The law is in the early stages of development on modes of public regulation of Internet expression – on such issues as defamation, copyright infringement, confidential sourcing and so-called “shield laws,” and

political commentary that can be perceived as “campaign expression” – and bloggers are sometimes finding themselves on the defensive. The Federal Election Commission, for example, is considering how to treat political expression on the Internet, including blogging, under federal campaign finance laws. There is little doubt that “journalists” engaging online in political expression would be exempt from federal reporting requirements, but the fate of bloggers depends upon drawing some legal lines of inclusion and exclusion.

The law in various guises, then, may become something of a standards-setting mechanism for blogs, including legal blogs. It is far from clear that, if bloggers cannot qualify for First Amendment free press clause protection as “journalists,” that they would get equal or equivalent protection under the Amendment’s free speech clause. But bloggers may want to hesitate before reaching too eagerly for inclusion under the press clause.

Jeff Jarvis, a multi-faceted teacher and student of journalism and himself an engaging blogger at BuzzMachine.com, has said, “I don’t want to see an official definition of who is a journalist, not only because this is likely to exclude bloggers but also because official status can be given and can be taken away. Danger lurks there.”<sup>2</sup> Elaborating on those thoughts in a recent appearance of the “Newshour with Jim Lehrer” on PBS-TV, Jarvis said a government-derived definition of a journalist “gets very dangerously close to certifying or licensing journalists . . . My problem now is I really honestly don’t know how to construct this in such

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a way that covers our new world of journalism and our new world of media.”<sup>3</sup>

However, if legal bloggers can look beyond the definitional problem, or at least postpone addressing it until the dangers are more apparent or imminent, then they need to address the nature of the influence they seek to have on the practice of law and the administration of justice. Thus, the inquiry returns to the question of being taken seriously as a source of legal news and commentary. And that puts the focus on content.

A particularly vivid example of using blog content to try to have an impact on the law revolves around a very important war-on-terrorism case at the Supreme Court (“Court”). The case of *Hamdan v. Rumsfeld*,<sup>4</sup> arriving at the Court from the U.S. Court of Appeals for the District of Columbia Circuit, was at least as constitutionally significant as the trio of terrorism cases the Court had decided in 2004.<sup>5</sup> It raised the question of presidential authority to create, without explicit authorization by Congress, an entirely new military court system to try war crime charges against foreign nationals captured as terrorism suspects.<sup>6</sup>

For weeks after all of the legal papers had been filed in the Court, while the Justices were weighing whether to hear the case, a number of legal blogs continued to apply what the writers clearly hoped was gentle pressure on the Court to take the case. The prestige of hundreds of law professors was drawn upon. It was not clear that this was a carefully orchestrated effort, but the common objective of promoting the case’s worthiness for review was self-evident. Close observ-

ers of the Court had seen nothing like it. But, operating on the assumption that the Court has become Internet-savvy, this kind of outside advocacy by blogs is likely to grow more common, a kind of digital *amici* advocacy.

Not all legal blogs, of course, so explicitly target courts in attempts to shape pending cases. Some are primarily reportorial. For example, Howard Bashman’s very popular “How Appealing”<sup>7</sup> blog seldom engages in commentary, and even less often in outright advocacy. Some combine news with commentary and analysis. Professor Douglas Berman’s “Sentencing Law and Policy,”<sup>8</sup> Professor Julian Ku’s “Opinio Juris”<sup>9</sup> on international law, and Professor Rick Hasen’s “Election Law”<sup>10</sup> are excellent, high-quality examples. Some are largely devoted to commentary. Professor Jack Balkin’s “Balkinization,”<sup>11</sup> for example, is often visited, and deservedly so. Some provide forums for meaningful debates. For example: *Scotusblog.com*<sup>12</sup> (this article’s author writes for this site) staged a compelling debate on the Supreme Court’s decision in 2005 in *Kelo v. New London*,<sup>13</sup> an eminent domain case.

The list and the variety go on. Some accept advertising and others refuse. Some are humorous, others not funny at all. Some engage in distasteful self-promotion, others let their content speak for them. On the fringes, at least of legal respectability, are blogs that are aggressively critical or snide, as Ariana Huffington’s blog<sup>14</sup> can be, or that are too clever, as “Underneath Their Robes”<sup>15</sup> has often tried to be.

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Blogs that report actual news of the law are not mere substitutes for newspaper, news wire services, or radio or television newscasts. One does not often see in blog reports that ingrained habit of “regular” journalism outlets – getting canned quotes from opposite sides of a controversy, or quotes that say something the author is forbidden to say on his or her own. And legal blogs more often reflect the direct assessments of the authors of their posts, than of unnamed sources.

The hallmark of true influence – citation as authoritative in case law or legal briefs – is beginning to develop, but so far can hardly be called frequent, or common. Lawyers though, are increasingly becoming regular readers of blogs, and take full advantage of the “Comment” sections of legal blogs. Even if they are not yet in the habit of citing to blog posts, attorneys’ views are no doubt being shaped, some of the time, by what they read. And many attorneys get the first word of legal developments from blogs, well in advance of official notification from courts. It is far too soon, however, to draw any meaningful conclusions suggesting that the substance of American law is being altered because of the legal blogosphere’s impact. But legal blogs, along with blogs of all sorts, are expanding rapidly, (up to 70,000 new blogs emerge monthly, according to Technorati, a web site that tracks such things)<sup>16</sup> and blog-surfing is bound to grow as well. The problem for legal blogs, then, may be the difficulty in getting noticed amid all of the blog noise. One characteristic of the blogging community, however, will help in this regard: there is considerably less selfishness

among legal bloggers than there is among “regular” journalists, who as a rule are seldom willing to acknowledge the work of their competitors. Legal blogs have an already well-developed habit of linking to each other’s work, and the sense of community is becoming the best advertising that one does not need to have money to buy. It reflects, in its own way, the “open source” mentality that is quite prevalent in the Internet village.

### Notes

1 The author of this article, though a blogger much of the time, is credentialed to the Supreme Court as a correspondent of another, traditional media outlet.

2 Buzz Machine, <http://www.buzzmachine.com/index.php/2005/11/02/privilege-for-whom/> (last visited Feb.22, 2006).

3 Interview by Jim Lehrer with Jeff Jarvis, *Journalism and the CIA Leak Case*, NewsHour WITH JIM LEHRER (Nov. 2, 2005), [http://www.pbs.org/newshour/bb/media/july-dec05/leak\\_11/2.html](http://www.pbs.org/newshour/bb/media/july-dec05/leak_11/2.html).

4 542 U.S. 507 (2004).

5 See *Id.*; *Rasul v. Bush*, 542 U.S. 466 (2004); *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

6 *Hamdan v. Rumsfeld*, 415 F.3d 33, 367 (D.C. Cir. 2005).

7 How Appealing, <http://legalaffairs.org/howappealing/> (last visited Feb. 22, 2006).

8 Sentencing Law and Policy, <http://www.sentencing.typepad.com/> (last visited Feb. 22, 2006).

9 *Opinio Juris*, <http://lawofnations.blogspot.com/> (last visited Feb. 22, 2006).

10 Election Law, <http://electionlawblog.org/> (last visited Feb. 22, 2006).

11 Balkinization, <http://balkin.blogspot.com/> (last visited Feb. 22, 2006).

12 SCOTUSblog.com, at <http://www.scotusblog.com/movabletype/> (last visited Feb. 22, 2006).

13 126 S. Ct. 326 (2005).

14 The Huffington Post, <http://www.huffingtonpost.com/> (last visited Feb. 22, 2006).

15 Underneath Their Robes, <http://underneaththeirrobes.blogspot.com/main/> (last visited Feb. 22, 2006).

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16 Technorati, State of the Blogosphere, <http://technorati.com/weblog/2006/02/81.html> (last visited Feb. 22, 2006).